

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
NORTHERN DIVISION

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL. PLAINTIFFS

VERSUS CAUSE NO. 3:18-cv-00171-CWR-FKB

THOMAS E. DOBBS, M.D., ET AL. DEFENDANTS

MOTION HEARING PROCEEDINGS  
BEFORE THE HONORABLE CARLTON W. REEVES,  
UNITED STATES DISTRICT COURT JUDGE,  
MAY 21, 2019,  
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE PLAINTIFFS: CAITLIN GRUSAUSKAS, ESQ.  
HILLARY SCHNELLER, ESQ.  
AARON S. DELANEY, ESQ.  
ROBERT B. MCDUFF, ESQ. (TELEPHONIC)

FOR THE DEFENDANTS: PAUL E. BARNES, ESQ.  
WILSON D. MINOR, ESQ.  
ROBERT E. SANDERS, ESQ.  
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1                                   **IN OPEN COURT, MAY 21, 2019**

2  
3           MS. SUMMERS: All rise. Hear ye, hear ye, hear ye, the  
4 United States District Court for the Southern District of  
5 Mississippi, Northern Division, is now in session. The Honorable  
6 Carlton Reeves presiding. May God save the United States and this  
7 Honorable Court.

8           THE COURT: You may be seated. You may call the case.

9           MS. SUMMERS: The Court calls *Jackson Women's Health*  
10 *Organization, et al., versus Dobbs, et al., Civil Action*  
11 *No. 3:18-cv-171-CWR-FKB.*

12           THE COURT: We're here today on the parties' motion for  
13 leave, the plaintiffs' motion to leave -- for leave, excuse me --  
14 to file supplemental amended complaint and the plaintiffs' motion  
15 for preliminary injunction.

16           Is the plaintiff ready?

17           I understand Mr. McDuff is on by telephone; is that  
18 correct?

19           MR. MCDUFF: Yes, Your Honor.

20           THE COURT: All right. Can you hear us fine?

21           MR. MCDUFF: I can. Thank you.

22           THE COURT: All right. Is counsel for the plaintiff  
23 ready?

24           MS. GRUSAUSKAS: Yes, Your Honor.

25           THE COURT: All right. Counsel for defendant ready?

1 MR. MINOR: Yes, Your Honor. We do have one housekeeping  
2 matter when you're ready to hear it.

3 THE COURT: Okay.

4 MR. MINOR: I don't know if there's anyone else --

5 THE COURT: Make sure you're speaking into the microphone.

6 MR. MINOR: I apologize. I'm not sure whether there's  
7 anybody in the overflow room or if there's an audio feed. I just  
8 wanted to make sure that my understanding is correct that the  
9 overflow room will be treated like an extension of this courtroom,  
10 and that no audio or visual recordings can be made in the overflow  
11 room; is that correct?

12 THE COURT: No one other than the press has audio-visual  
13 capacity. The attorneys know if they have it, they are bound by  
14 the local rules, so they know that the press -- there was an order  
15 that the Court sent yesterday, and the press members are bound by  
16 that order. So I am under the presumption that people will obey  
17 my rule.

18 MR. BARNES: Thank you, Your Honor.

19 THE COURT: All right. Or any court order for that  
20 matter. We'll hear the motion to amend first, and then we'll  
21 proceed from there.

22 MS. GRUSAUSKAS: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MS. GRUSAUSKAS: I'm Caitlin Grusauskas from the law firm  
25 Paul Weiss on behalf of the plaintiffs, Jackson Women's Health

1 Organization and Dr. Sacheen Carr-Ellis.

2 Your Honor, six months ago in your order striking down the  
3 State's ban on abortion after 15 weeks, you asked the question,  
4 why are we here? Today the question is, why are we here again?

5 Your Honor, we're here again today to challenge yet  
6 another unconstitutional law passed by the State of Mississippi  
7 aimed at closing out -- closing Mississippi's last remaining  
8 abortion clinic and denying thousands of Mississippi women their  
9 constitutional rights. So I'll be arguing plaintiffs' motion  
10 seeking the Court's permission to add our challenges to this  
11 latest law to our current lawsuit, and my colleague, Ms.  
12 Schneller, will be arguing the motion for a preliminary  
13 injunction.

14 THE COURT: Okay. I'll just ask you to slow down just a  
15 little bit.

16 MS. GRUSAUSKAS: So as the Court knows, plaintiffs'  
17 current lawsuit is a broad, comprehensive challenge to various  
18 laws that Mississippi has passed in its decades-long campaign to  
19 eliminate women's right to abortion. Most recently that campaign  
20 has transitioned from laws that restrict abortion access in  
21 various unconstitutional ways to outright bans, like the 15-week  
22 ban that this Court struck down just six months ago.

23 And now in open defiance of settled Supreme Court  
24 precedent, and indeed in open defiance of this Court's ruling on  
25 the 15-week ban, the Mississippi legislature passed an even more

1 restrictive law, the six-week ban, which is what brings us here  
2 today. The six-week ban is just a new legislative means of  
3 achieving the same unconstitutional end, namely, the elimination  
4 of a woman's right to abortion in Mississippi. The plaintiffs,  
5 therefore, seek leave to supplement their existing complaint to  
6 add challenges to the six-week ban.

7 Rule 15D of the Federal Rules of Civil Procedure permits a  
8 party to supplement a complaint to add, as is the case here,  
9 events or occurrences taking place after the original complaint is  
10 filed. As the text of the notes to the rules states expressly,  
11 the Court has "broad discretion to permit supplementation."  
12 Indeed, as the case is recognized, the aim of supplementation is  
13 to promote a complete adjudication of the parties dispute, and  
14 supplementation is appropriate when it serves the interests of  
15 judicial economy.

16 Supplementation here would achieve that result permitting  
17 a complete adjudication of the parties' dispute which arises from  
18 Mississippi's ongoing purposeful campaign to eliminate abortions  
19 in this state through a series of unconstitutional restrictions  
20 and outright bans.

21 THE COURT: So far we have sep- -- the case that was filed  
22 back last year, the 15-week ban. The Court has constructed an  
23 avenue where that case was -- would be done in two phases; is that  
24 correct?

25 MS. GRUSAUSKAS: You mean the 15-week ban, yes.

1 THE COURT: The 15-week ban.

2 MS. GRUSAUSKAS: Correct.

3 THE COURT: Right. So if -- or where are we in that  
4 process? The parties, have they engaged in taking the discovery  
5 that they thought they needed to take on phase two of that case?

6 MS. GRUSAUSKAS: So the schedule for phase two is  
7 discovery is ongoing. I believe discovery doesn't close for  
8 another year in phase two, so it's certainly ongoing. And our  
9 position is that our challenges to the six-week ban can certainly  
10 be addressed concurrently with -- with all of the rest of the  
11 discovery as to our other claims.

12 THE COURT: What other type of discovery do you think one  
13 would need that would be different for the six-week ban than the  
14 15-week ban?

15 MS. GRUSAUSKAS: None, Your Honor, frankly. With respect  
16 to the motion for preliminary injunction, you know, all of the  
17 necessary discovery and facts are in the court record,  
18 Dr. Carr-Ellis' declaration. The sole question, as the Court  
19 noted in its ruling on the 15-week ban, is the point of viability,  
20 that's the only factual issue that's really relevant here. So all  
21 the facts that are necessary to resolve the challenge to the  
22 six-week ban, because it is also a previability ban on abortion,  
23 are in the court record. And so that challenge can be resolved,  
24 you know, without additional discovery. And I would just note  
25 that we do have -- we have added some claims, two other claims

1 with respect to the -- to the six-week ban. Namely that are not  
2 the subject of our motion for preliminary injunction.

3 The claim that the six-week ban has the purpose of  
4 imposing a substantial obstacle on women seeking abortion and that  
5 also it is a form of sex discrimination and violation of equal  
6 protection. But as to those two claims, again, the discovery  
7 would overlap substantially with the discovery for all of our  
8 existing claims.

9 THE COURT: Okay. You may continue.

10 MS. GRUSAUSKAS: Sure. So just as an example, the school  
11 desegregation cases that were cited in our briefs are illustrative  
12 of how supplementation is appropriate in situations like this  
13 where states are, to use the language of the Supreme Court in  
14 *Griffin*, engaged in "continued persistent efforts to restrict or  
15 deny constitutional rights in defiance of court rulings in  
16 furtherance of an unconstitutional scheme."

17 Here we have a very similar situation where the  
18 Mississippi legislature enacted the six-week ban with the full  
19 knowledge that it is unconstitutional and surely with the full  
20 knowledge that it is in contravention of this Court's November  
21 ruling on the 15-week ban. The six-week ban is just the latest of  
22 the State's continued persistent efforts to eliminate women's  
23 right to abortion.

24 The supplementation here for the reasons we were just  
25 discussing would serve the interests of judicial economy.

1 Resolution of plaintiffs' challenges to the six-week ban is  
2 inextricably intertwined with resolution of plaintiffs' challenges  
3 to all the other laws that are in our complaint.

4 Frankly, if the six-week ban were to go into effect, it  
5 would exacerbate the already substantial burdens on women that are  
6 imposed by the laws that we already are challenging, and because  
7 it is a near total ban on abortion, if it goes into effect, it  
8 will drastically change the nature of the litigation. It would  
9 drastically cut down on the number of patients that the clinic is  
10 able to see which would affect our burden arguments in the scope  
11 of fact and expert discovery.

12 THE COURT: Slow down. I'm doing that for the court  
13 reporter. I can --

14 MS. GRUSAUSKAS: I apologize.

15 THE COURT: I'm following you well but --

16 MS. GRUSAUSKAS: It's a bad habit.

17 THE COURT: Yeah.

18 MS. GRUSAUSKAS: Okay. Thank you, Your Honor.

19 And, again, as I was saying, the legal and factual issues  
20 relevant to our challenges to the six-week ban substantially  
21 overlap with the legal and factual issues that are relevant to  
22 resolution of our existing claims, and the Court is already  
23 familiar with many of those issues.

24 First, we have the 15-week ban that this Court already  
25 struck down as an unconstitutional ban on abortion prior to

1 viability. The six-week ban is unconstitutional for exactly the  
2 same reasons. It's governed by exactly the same legal standard  
3 and the exact same key facts, namely the point of viability.

4 Second, as I was saying, we also claim that the six-week  
5 ban has the purpose of imposing a substantial obstacle on women  
6 seeking abortions. We have the same claim as to the other laws in  
7 the complaint, all governed by the same legal standard, and we're  
8 also challenging the six-week ban as a form of sex discrimination  
9 which overlaps with our substantive due process challenges to the  
10 other laws in terms of the impact on women and their ability to  
11 participate equally.

12 THE COURT: Is the sex discrimination claim a part of the  
13 15-week ban claim?

14 MS. GRUSAUSKAS: It was not, no, Your Honor.

15 THE COURT: Okay. So now you're raising a whole new area,  
16 a claim of sex discrimination?

17 MS. GRUSAUSKAS: Yeah, I wouldn't -- I wouldn't  
18 necessarily characterize it as a whole new area, but it's  
19 technically a new legal claim. But it's the --

20 THE COURT: What, if any, discovery does the plaintiff  
21 believe would need to be made to litigate that particular claim?

22 MS. GRUSAUSKAS: I think we're at -- it's a little early  
23 to say, but I think we would be interested in, you know,  
24 propounding discovery on the ways in which this law impacts women  
25 and impacts their ability to participate equally in the economic

1 and social life of this nation. It's basically born out of a  
2 stereotype that women are -- you know, the proper role for women  
3 is to bear children, and so we would seek facts and expert  
4 discovery related to that.

5 THE COURT: Would the sex discrimination discovery also  
6 deal with whether or not procedures that the general population  
7 undergo for various medical conditions, males, for example, if  
8 they have to be subjected to different requirements or stages,  
9 24-hour waiting periods, and, you know, for a vasectomy or  
10 something like that. Would that be part of the sex -- would that  
11 help inform your sex discrimination claim?

12 MS. GRUSAUSKAS: I certainly think it's possible, Your  
13 Honor, yes.

14 THE COURT: Okay.

15 MS. GRUSAUSKAS: If I may continue?

16 THE COURT: You may.

17 MS. GRUSAUSKAS: Thank you. So therefore, we think it's  
18 very appropriate for all of these similar interrelated challenges  
19 to be heard and resolved in a single proceeding before a single  
20 judge who's already familiar with the issues.

21 I just note for the Court's awareness, there's a recent  
22 case from Alabama that actually followed this exact same  
23 reasoning. The case is *West Alabama Women's Center v. Miller*. It  
24 was decided in 2016 by Judge Thompson. It's not cited in our  
25 briefs, but I have copies with me. And it's -- I can give -- the

1 citation is *318 F.R.D. 143*, and there, Judge Thompson permitted  
2 plaintiffs to supplement their complaint in a similar abortion  
3 lawsuit that challenged Alabama's admitting privileges law to add  
4 challenges to two totally new abortion laws that had passed  
5 concerning proximity to a school and the dilation and evacuation  
6 procedure. And his reasoning was, you know, essentially what our  
7 argument is that the claims involved the same or similar factual  
8 and legal issues, and the Court was already familiar with those  
9 legal and factual issues. And, thus, as a matter of judicial  
10 economy, it made sense to litigate those in a single proceeding,  
11 and so that same reasoning applies here.

12 Now, as I had also stated at the outset, the question of  
13 whether supplementation is to be permitted is left to the Court's  
14 sound discretion, and that is to be guided by three factors.  
15 First, whether there's been undue delay or bad faith. Second,  
16 whether defendants will suffer undue prejudice, and third, whether  
17 the new claims would be futile.

18 Now, defendants concede in the very first footnote of  
19 their brief that all of these discretionary factors actually weigh  
20 in favor of supplementation, which pretty much ends the analysis,  
21 but just to quickly recap, you know, there's been no undue delay  
22 here. We brought our motion just a week after Governor Bryant  
23 signed the six-week ban into law. For all the reasons we were  
24 discussing before, defendants will suffer no undue prejudice as  
25 they concede, you know, all of the litigation can proceed, you

1 know, as it currently is in connection with phase two. No  
2 additional discovery is needed for our motion for a preliminary  
3 injunction and --

4 THE COURT: Slow down -- slow down.

5 MS. GRUSAUSKAS: Sorry, I can't help it.

6 THE COURT: You're below the Mason-Dixon line now.

7 MS. GRUSAUSKAS: Yes. I know, it's a problem. I was  
8 practicing, but anyways, not so well.

9 And then finally, the third factor of futility, again, as  
10 defendants concede, our claims are -- with respect to the six-week  
11 ban are not futile as shown in our motion for preliminary  
12 injunction, which my colleague will argue shortly. We're  
13 reasonably certain to succeed in showing that this is an  
14 unconstitutional restriction on abortion, ban on abortion.

15 And so all of these discretionary factors show that  
16 there's really no compelling reason not to permit supplementation  
17 here, and frankly the alternative would be to force us to file a  
18 new, completely separate lawsuit, which would be inefficient and a  
19 waste of the parties and the Court's resources. It would require  
20 coordination between this Court and the other Court.

21 THE COURT: I assume you'll file a motion to consolidate  
22 after that, right?

23 MS. GRUSAUSKAS: Exactly, yes. But we'd hope to avoid  
24 having to do that unnecessary work. So for all these reasons and  
25 because all the discretionary factors weigh in favor of

1 supplementation, we respectfully submit that our motion should be  
2 granted. Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. MINOR: Morning.

5 THE COURT: Good morning.

6 MR. MINOR: Wilson Minor from the Attorney General's  
7 Office on behalf of Dr. Dobbs and Dr. Cleveland. May it please  
8 the Court?

9 THE COURT: You may proceed. Well, let me ask you this.  
10 You said on behalf of Dr. Dobbs and Dr. --

11 MR. MINOR: Dr. Cleveland.

12 THE COURT: -- and Dr. Cleveland?

13 MR. BARNES: Your Honor, the Attorney General's Office  
14 represents Dr. Dobbs, the state medical officer, and Dr. Cleveland  
15 the head of the state medical board. The local defendants in this  
16 action have their own counsel who are here. I can let them  
17 introduce themselves.

18 THE COURT: Okay. Thank you. Thank you. Because I was  
19 going to ask, are we going to hear from the local defendants?

20 MR. SANDERS: Your Honor, I'm Bob Sanders. I represent  
21 the District Attorney, Robert Shuler Smith. I have filed a  
22 joinder on behalf of Mr. Smith with the State's motion, but we  
23 will not argue separately.

24 THE COURT: Okay. So the District Attorney agrees with  
25 the State's brief?

1 MR. SANDERS: That's correct, Your Honor.

2 THE COURT: All right.

3 MR. TEEUWISSEN: Good morning, Pieter Teeuwissen on behalf  
4 of Gerald Mumford, who is the County prosecuting attorney and may  
5 have enforcement powers. He's sued in his official capacity,  
6 which is tantamount to suing Hinds County. I represent him in his  
7 official capacity as well as Hinds County.

8 We take no position in this matter. Mr. Mumford will  
9 enforce the law. If an order comes down saying Mr. Mumford  
10 shouldn't enforce the law, he will obey this Court's order. As  
11 this Court particularly knows, the audience may not know, Hinds  
12 County has a lot of other lives and a lot of other issues that we  
13 need to focus on. We are here purely in a neutral fashion.

14 THE COURT: Okay. Thank you, Mr. Teeuwissen.

15 MS. JACKSON WINTERS: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MS. JACKSON WINTERS: I'm Lashundra Jackson Winters on  
18 behalf of Wendy Wilson, the chief prosecutor for the City of  
19 Jackson, which is tantamount to suing the City, itself.

20 THE COURT: Okay.

21 MS. JACKSON WINTERS: And we take no -- we're not going to  
22 be doing an argument today either, Your Honor.

23 THE COURT: Okay. You take -- but do you join in what the  
24 State's argument is?

25 MS. JACKSON WINTERS: Yes, Your Honor.

1 THE COURT: You do join in it? Okay. Thank you.

2 Mr. Minor, you may proceed.

3 MR. MINOR: Thank you, Your Honor.

4 We're here today to -- for the Court to determine whether  
5 the plaintiff should be given leave to supplement their complaint  
6 with a constitutional challenge against the fetal heartbeat law,  
7 which is Senate Bill 2116. The plaintiffs have argued that this  
8 claim is interrelated or overlaps with their other claims, but  
9 that's simply not the case.

10 The core of this case is the -- or the remaining part of  
11 this case, the core of that part of the case, is the cumulative  
12 effects part of the case. Their claim that five different  
13 abortion statutes violate the right to abortion and those statutes  
14 are the State's licensing scheme for abortion clinics, the 24-hour  
15 waiting period, the informed consent requirement, the physicians  
16 only requirement, and the -- the law that prohibits abortion  
17 clinics from using telemedicine.

18 But their proposed claim against the fetal heartbeat law  
19 is not a part of the cumulative effects -- their cumulative  
20 effects claim. It's a freestanding claim. It's separate and  
21 distinct, both factually and legally, so --

22 THE COURT: They contend, I believe, that the 15-week ban  
23 prohibits abortions after 15 weeks, and the Court has already  
24 ruled that that's unconstitutional. Now, there's a statute that  
25 says, hold on, we're going to do less than 15 weeks. We're going

1 to do six weeks.

2 MR. MINOR: We disagree that it's a six-week ban; that's  
3 their characterization. It's a -- the law prohibits abortions  
4 after a fetal heartbeat is detected.

5 THE COURT: And a fetal heartbeat can be detected when?

6 MR. MINOR: Mr. Barnes is going to address the -- he'll  
7 address that issue in our -- in opposition to the motion for  
8 preliminary injunction. I'm just going to argue on the motion to  
9 supplement.

10 Yes, it -- the law which -- which the fetal heartbeat law  
11 is most similar to is the 15-week law, but that -- that law is no  
12 longer -- or the claim against that law is no longer before the  
13 Court. It's before the Fifth Circuit, and the plaintiffs have not  
14 asked the Court to reopen phase one or part one of the case which  
15 relates to the 15-week law. And they haven't asked the Court to  
16 modify its injunction so the --

17 THE COURT: Well, let me ask you this. Has the plaintiff  
18 articulated the correct standard for -- to amend the complaint to  
19 add this particular claim?

20 MR. MINOR: I don't think so. In the Fifth Circuit -- the  
21 Fifth Circuit hasn't exactly articulated a standard for this.  
22 There's district courts throughout the Fifth Circuit, though, that  
23 have said that -- that the purpose of supplementation is to allow  
24 a party to set forth new facts that have occurred since the filing  
25 of the original pleading and that affect the controversy and the

1 relief sought. So the purpose of the supplemental pleading is to  
2 bring the action up to date.

3 Now, you can add claims. I'm not disputing that. You can  
4 add claims. But the claims that you could be permitted to add  
5 must stem from one of the original causes of action, and this  
6 claim against the fetal heartbeat law is -- does not stem from any  
7 of the other claims. It's a separate and distinct law passed by a  
8 different legislature in a different year. And it doesn't -- it  
9 doesn't stem from the 15-week law or any of the other claims  
10 against the other laws. That's the standard that I've seen stated  
11 in --

12 THE COURT: You contend there's a different legislature?

13 MR. MINOR: It was a different year.

14 THE COURT: Just a different year.

15 I mean, I imagine the legislature may have changed because  
16 somebody --

17 MR. MINOR: I mean, sorry, the same legislature. But it  
18 was a different year, so the composition may have changed.

19 THE COURT: But how do you explain your footnote one of  
20 your -- of your brief to determine whether to grant leave to file  
21 a supplemental pleading under Rule 15D, a district court must also  
22 weigh several factors, and then it says, one, two, and three. I  
23 mean, this is your brief.

24 MR. MINOR: I agree those are factors the Court must  
25 weigh, but those are not the end of the discussion. You have to

1 also satisfy the standard that the new claims you're asserting  
2 grew out of the original dispute between the parties, and they do  
3 not satisfy those standards. So even if they meet those factors,  
4 I don't think that's sufficient to -- to permit supplementation.

5 THE COURT: I mean, it -- doesn't it boil down to whether  
6 six is less than 15? And if 15 -- and I know we're going to get  
7 into that preliminary injunction part of the thing. But the new  
8 claim they're bringing -- I guess the real new claim that they  
9 bring is one that they say is sex discrimination, or -- or I think  
10 the plaintiff has admitted that, that this is a new claim, that  
11 that claim was not brought in that form in the earlier lawsuit or  
12 in the -- or in the original lawsuit.

13 So is it that claim that the Court should not allow to go  
14 forward?

15 MR. MINOR: No. They assert two constitutional challenges  
16 to the fetal heartbeat law, substantive due process based on *Casey*  
17 and all the abortion case law, and then the second one is the  
18 equal protection one. Our argument is you shouldn't allow either  
19 claim to be supplemented.

20 THE COURT: I mean, the substantive due process claim goes  
21 toward the 15-week too, right, because --

22 MR. MINOR: No. They assert it -- they assert it as a  
23 freestanding claim. It's Count 7 and Count 8 in their proposed  
24 supplemental amended complaint. It's not -- the 15-week claim is  
25 separate.

1 THE COURT: How would the State be prejudiced if the Court  
2 allowed them to amend the complaint to add -- to amend the  
3 complaint and add it to the existing complaint? How would the  
4 State be prejudiced?

5 MR. MINOR: The State's position is that it just doesn't  
6 make any sense to jam all these claims together in one huge  
7 lawsuit. Effectively what the Court did before was separate the  
8 cumulative effects part of the case with the 15-week law, and we  
9 basically litigated it as two separate cases. Now, you're going  
10 to --

11 THE COURT: Can we -- go ahead.

12 MR. MINOR: Sorry. If we're going to add a third claim,  
13 which is in effect a third lawsuit, we're going to be basically  
14 litigating three lawsuits in one. It just makes -- it makes more  
15 sense to separate that one out and have a separate lawsuit.  
16 That's all I'm saying.

17 THE COURT: And then consolidate it or separate -- or a  
18 freestanding lawsuit that might go before a different judge, huh?

19 MR. MINOR: Or it might be assigned to Your Honor.

20 THE COURT: All right.

21 MR. MINOR: So, I mean, the plaintiffs rely on these  
22 school desegregation cases, which, I think, are clearly  
23 distinguishable. In those cases, you know, the federal courts  
24 ordered the schools to be desegregated, and then after the courts  
25 ordered that then the legislature and the city councils in those

1 states basically in one of the cases they shutdown the public  
2 schools and they used the money for the public schools for  
3 vouchers for white children to go to private schools. In the  
4 Louisiana case they cite, the State of Louisiana also paid for  
5 private tuition for white children who didn't want to attend the  
6 public schools. So it was clear that the State was trying to  
7 circumvent or get around the Court's rulings, and that's not the  
8 case here.

9 As I stated earlier, the plaintiffs do not claim that  
10 we're, you know, interfering with the Court's injunction against  
11 the 15-week law, and they don't seek to reopen part one of the  
12 case.

13 THE COURT: Would it have appeared it was getting around  
14 it if the State had enacted a 16-week ban after the Court had  
15 struck down a 15-week ban?

16 MR. MINOR: I don't think so.

17 THE COURT: What about if the State had done a 14-week ban  
18 immediately after the Court did the 15-week ban?

19 MR. MINOR: That would be a closer question but --

20 THE COURT: So a six-week ban is not close at all?

21 MR. MINOR: No. No. The law that we're here on today  
22 is -- is -- no, I'm saying -- if they amended the 15-week law to  
23 make it 14 weeks. Is that what you were saying?

24 THE COURT: Well, I'm just saying. I mean, you're talking  
25 about the school desegregation cases. If the State went and did

1 X, Y, and Z after the Court had ruled, you said that would be in  
2 clear defiance. Maybe you didn't use the word "defiance," but you  
3 know. But what I'm asking is the fact the Court said that the  
4 15-week ban is unconstitutional, if the legislature had come  
5 forward -- because the Court found that at 15 weeks a fetus is not  
6 viable, that it did not meet the viability threshold.

7 So immediately after the Court issued that ruling, if the  
8 legislature had enacted a statute that said any abortion after  
9 16 weeks, would that appear to be in specific defiance of the  
10 Court?

11 And then the second question was, what if they had done  
12 14 weeks?

13 MR. MINOR: No. If they had enacted a new law, it would  
14 be a new, separate, distinct cause of action which would require a  
15 new lawsuit. I misunderstood Your Honor's question. I thought  
16 you meant that if they amended the 15-week law itself and made it  
17 14 weeks, that would be a closer question, because you would be  
18 amending the statute that's being challenged in the lawsuit. That  
19 would be a closer question.

20 But when the legislature enacts a new law, hey, that's a  
21 new, clearly distinct cause of action to challenge that law, and  
22 that belongs in a separate lawsuit no matter what -- no matter  
23 what the lawsuit is that exists at the time. If it's a new law,  
24 it's a new cause of action.

25 THE COURT: Okay. So --

1 MR. MINOR: That's our position, and it's not in defiance  
2 of the Court's ruling. The Fifth Circuit hasn't ruled on the  
3 constitutionality of the 15-week law.

4 THE COURT: But I have.

5 MR. MINOR: I understand that.

6 THE COURT: And the U.S. Supreme Court.

7 MR. MINOR: We disagree with that -- with that position.  
8 But the Fifth Circuit hasn't ruled on it. I don't think -- I  
9 don't think the legislature is thumbing its nose at this Court's  
10 orders, and plaintiffs agree because they haven't asked the Court  
11 to enforce its injunction so --

12 THE COURT: So if they did ask the Court to enforce the  
13 injunction, what type of relief should they seek? Should the  
14 Court -- should they ask the Court to hold the legislature in  
15 contempt?

16 MR. MINOR: No. The legislature's passage of law doesn't  
17 interfere with the Court's injunctions. It's a new, separate law  
18 that requires a new, separate cause of action to challenge it,  
19 which belongs in a separate suit; that's our position.

20 THE COURT: Turning to the 15D argument, though, that's  
21 the -- that's the plaintiffs' threshold for trying to get  
22 relief -- trying to add this claim in. The statute was passed.  
23 It was signed by the governor. They didn't sit on their hands.  
24 They -- they waited a few days, I guess. I don't know how many.  
25 And they at least moved to amend after that point, so there was no

1 delay at least in bringing it to the Court's attention.

2 The State agrees, right?

3 MR. MINOR: We agree with that. Our point is that as the  
4 case sits before the Court today, it's all about the cumulative  
5 effects claim against these five -- five general abortion  
6 regulations, which are based on different legal principals and  
7 factual issues than the fetal heartbeat law. They're completely  
8 unrelated. They, I mean --

9 THE COURT: But wouldn't it help judicial economy if all  
10 these things are brought genally at the same time in the same  
11 proceeding?

12 MR. MINOR: No.

13 THE COURT: It would not?

14 MR. MINOR: No.

15 THE COURT: Okay.

16 MR. MINOR: I mean, Your Honor split the case in two to  
17 begin with and the -- the fetal heartbeat law would be more -- the  
18 discovery about that would be more analogous to the 15-week law,  
19 but they're not seeking to reopen that part of the case. So I  
20 think it should be -- we think it should be brought as a separate  
21 suit.

22 THE COURT: Are the parties still engaged in discovery on  
23 some of the claims?

24 MR. MINOR: We're currently in discovery on part two,  
25 which is the cumulative effects part of the case about the general

1 abortion regulations that have been in existence for some -- some  
2 for almost 30 years. And so this fetal heartbeat law doesn't  
3 belong in that -- in that part of the case. That's our point.

4 THE COURT: Could it be brought in this case and just  
5 stayed while the 15-week thing is dealt with?

6 MR. MINOR: I'm sorry. I don't understand your question,  
7 Your Honor.

8 THE COURT: I mean, you said it can't be brought in this  
9 case, because it has nothing to do with the five areas --

10 MR. MINOR: Right. The part two, yeah.

11 THE COURT: -- the part two where you all are engaged in  
12 discovery.

13 MR. MINOR: Right.

14 THE COURT: Could it be brought here and stayed and the  
15 parties deal with the substantive due process claim that is in the  
16 amended portion of the complaint and deal with the equal  
17 protection issue that is raised in the second part?

18 I'm just -- it just seems to me that if all of these  
19 things are wrapped up in one case that just feeds to judicial  
20 economy, right?

21 MR. MINOR: I don't think so. I think they're -- they're  
22 conceptually, legally, factually they're distinct from part two of  
23 the case, this law is, and it should be litigated separately.  
24 That's our -- that's our position.

25 THE COURT: Okay.

1 MR. MINOR: And it just doesn't make much sense to jam all  
2 these different claims together.

3 THE COURT: Okay.

4 MR. MINOR: And as far as the discovery we would need --  
5 we don't think there should be -- I mean, if the Court allows  
6 supplementation -- the plaintiffs to supplement, we don't think  
7 there should be any limit on discovery with respect to the fetal  
8 heartbeat claim. We're not sure exactly what discovery we would  
9 need, but we don't want to limit ourselves right now. We think  
10 the discovery should be unlimited if the Court proceeds with the  
11 fetal heartbeat law as part of this case.

12 THE COURT: Okay.

13 MR. MINOR: Thank you, Your Honor.

14 THE COURT: All right. You -- I think the parties both  
15 cite cases which suggest that it's within the Court's sound  
16 discretion; is that correct?

17 MR. MINOR: It is discretionary.

18 THE COURT: Okay.

19 MR. MINOR: But unlike a motion to amend your complaint,  
20 it's not freely given. It's not a matter of right almost.  
21 It's -- the standard is a little bit more stringent than the one  
22 that applies for a motion to amend a complaint.

23 THE COURT: But the umbrella that encapsulates all that is  
24 its discretion on the Court's part.

25 MR. MINOR: Yeah, it's reviewed under an abuse of

1 discretion standard by the Fifth Circuit.

2 THE COURT: All right. Thank you.

3 MR. MINOR: The defendants would respectfully request that  
4 the Court deny the motion for leave.

5 THE COURT: Okay. Thank you.

6 MR. MINOR: Thank you.

7 THE COURT: All right, Mr. Minor.

8 Any rebuttal?

9 MS. GRUSAUSKAS: Just really quickly, Your Honor.

10 Just two points of clarification with respect to our sex  
11 discrimination claim, I just want to explain that the discovery  
12 that we would be seeking on that claim with respect to the  
13 six-week ban is really the same discovery that we would be seeking  
14 with respect to our substantive due process challenges as to the  
15 existing claim, so the ways in which women are impacted. So we  
16 don't really -- it may be a new legal theory, but it's  
17 substantively going to involve the same facts and issues.

18 And then just with respect to Mr. Minor's last point about  
19 discovery, we would reserve the right to seek -- to limit  
20 discovery, if necessary, you know, within the bounds of what's  
21 relevant to the particular claim being litigated.

22 THE COURT: So if you bring your six-week claim, you're  
23 saying that you would not -- you would resist any discovery on  
24 that, because it would be treated in your mind like the 15-week  
25 claim has been treated?

1 MS. GRUSAUSKAS: So with respect to the claim that is the  
2 subject of our motion for preliminary injunction, which is  
3 basically the same as what we argued as to the 15-week ban, is  
4 it's an unconstitutional previability ban. We don't think that  
5 discovery is -- any further discovery is needed beyond what, you  
6 know, we already have in the record with respect to the point of  
7 viability and the fact that the six-week ban, you know, is a ban  
8 prior to viability.

9 THE COURT: Okay. Thank you. I understand that the  
10 District Attorney and the City of Jackson have joined in that  
11 portion of the argument, that Hinds County has taken a neutral  
12 position.

13 All right. Now, we're ready to turn to the -- the Court  
14 will reserve ruling on the motion to amend, and now I'll turn to  
15 the motion for preliminary injunction.

16 MS. SCHNELLER: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MS. SCHNELLER: Hillary Schneller for the plaintiffs, and  
19 I will try to avoid being repetitive given that we -- you know,  
20 the Court is familiar with the 15-week ban and my colleague, of  
21 course, has discussed the six-week ban already a bit.

22 As has been discussed, this year the State of Mississippi  
23 in defiance of decades of Supreme Court precedent and this Court's  
24 ruling just a few months ago passed Senate Bill 2116, which is a  
25 criminal ban on abortion after embryonic cardiac activity can be

1 detected. Meaning it bans abortion at approximately six weeks of  
2 pregnancy.

3 We are asking the Court to enter a preliminary injunction  
4 before the Act takes effect on July 1st, because it has the effect  
5 of unconstitutionally depriving women of the right to decide  
6 whether to continue a previability pregnancy. By banning abortion  
7 at six weeks, the act would essentially eliminate access to legal  
8 abortion in this state and, therefore, irreparably harm  
9 plaintiff's patients.

10 The U.S. Supreme Court and this Court, like every federal  
11 court before it, has declared that no state may ban abortion  
12 before viability. No effort to ban abortion like the act has  
13 survived a federal court challenge, and there is no reason for  
14 this Court to come to a different result.

15 So just to explain some of the facts a bit, using standard  
16 medical practice, including the practice of Jackson Women's Health  
17 Organization, the only licensed abortion facility in this state,  
18 cardiac activity can be detected as early as six weeks of  
19 pregnancy using a transvaginal ultrasound, and the State agrees  
20 with this fact.

21 And therefore, by banning abortion after embryonic cardiac  
22 activity has been detected, the act bans abortion at six weeks,  
23 which is before many people can even confirm they're pregnant.

24 As Dr. Carr-Ellis, the clinic's medical director, explains  
25 in her declaration for a person with a regular menstrual cycle six

1 weeks is just two weeks after a missed period, which is the first  
2 sign many people may know they're pregnant. And many women do not  
3 make their first State-required visit to the clinic at that point,  
4 let alone the second in-person visit where they can actually  
5 obtain an abortion procedure.

6 For other women missing a period when they're already six  
7 weeks pregnant may not be unusual. For them, the act could  
8 completely eliminate the chance to make the decision whether to  
9 continue or terminate a previability pregnancy.

10 Nearly all of the clinic's patients obtain abortion after  
11 six weeks, so in practice the act is a near total ban on abortion.  
12 If permitted to take effect, it will deny nearly all of pregnant  
13 Mississippians the right to decide whether to continue a  
14 previability pregnancy. Women will be forced to leave the state  
15 to obtain legal abortion care or be forced to remain pregnant  
16 against their will.

17 And in permanently enjoining the 15-week ban just a few  
18 months ago this Court made three points that apply with equal  
19 force to this latest attempt to ban abortion before viability.  
20 First, in *Casey*, the Supreme Court upheld *Roe's* essential holding  
21 that no state may deprive any woman of the decision whether to  
22 continue a pregnancy before viability, and this Court is bound to  
23 follow that precedent, which applies regardless of the point  
24 before viability that the ban begins to operate, regardless of the  
25 reasons the State may assert in support of the ban, regardless of

1 what exceptions it may have, and the total number of women the ban  
2 may affect.

3 Second, viability means a reasonable likelihood of  
4 sustained survival outside the womb, which, as this Court has  
5 recognized, in striking down the 15-week ban occurs at  
6 approximately 23 to 24 weeks.

7 And, third, when evaluating a ban on abortion the only  
8 factual question is whether it operates before or after viability.

9 Here the State agrees that cardiac activity is detectable  
10 as early as six weeks. The State also concedes, as it did with  
11 the 15-week ban, that it has no evidence that viability is  
12 possible at six weeks, and the State concedes that the act will  
13 prohibit abortion for at least some women. In other words, those  
14 women who seek abortion after embryonic cardiac activity is  
15 detected, and those women who do not fall within the act's  
16 extremely limited exception. In short, the act bans abortion  
17 before viability and is clearly unconstitutional.

18 THE COURT: Is that framework still -- you talk about --  
19 you mentioned that the Court is bound by the precedent going back  
20 as far as *Roe*, *Casey*, and the rest of them. Last week the Supreme  
21 Court issued a decision in *Franchise Tax Board of California*  
22 *versus Hyatt*.

23 Has that in any way changed how this Court ought to view  
24 Supreme Court precedent? Has the analysis changed?

25 Because I think in that case, the Court stepped away from

1 a decision -- from a line of decisions that were -- were ingrained  
2 at least for 40 years. So how does that impact on how the Court  
3 should view the precedent that undergirds a woman's right to have  
4 an abortion?

5 MS. SCHNELLER: So it does not change the analysis at all.  
6 *Roe* and *Casey* remain good law and clear Supreme Court precedent  
7 that was reaffirmed as early as -- you know, as recently as 2016  
8 in *Whole Women's Health*. And I would just make, I think, two  
9 points, you know, in the -- in that case that you just mentioned  
10 the Supreme Court itself overturned precedent. It is only for the  
11 Supreme Court to overturn their precedent, and they have clearly  
12 not done so with respect to the fundamental right to decide  
13 whether to continue a pregnancy before viability.

14 And, second, even if there was some indication the Court  
15 is stepping away from precedent, which it has not done in this  
16 area, it is for the court, the Supreme Court, to, you know, give  
17 that final ruling. It's not for the District Court to sort of  
18 anticipate what the Supreme Court may do in the future.

19 THE COURT: I mean, but when I decided the 15-week ban, I  
20 was rather firm and sure that what the Supreme Court had said in  
21 *Casey* and *Hellerstedt* and all because it -- *Casey*, for example,  
22 devotes a whole section to how you would view precedent. So how  
23 does -- does that at all now conflict or is that -- is that  
24 section of *Casey*, for example, that discusses being wed and being  
25 bound by precedent, I mean, because the court could -- this Court

1     could say I'm bound by precedent, period. Precedent says this;  
2     I'm bound by it, period.

3             But it seems as if possibly this *Hyatt* case sort of  
4     shakens that foundation to some degree.

5             MS. SCHNELLER: So, again, I don't think it shakes any  
6     foundation with respect to *Roe*, *Casey*, or *Whole Woman's Health*.  
7     The section of *Casey* that discusses stare decisis and precedent is  
8     really a discussion of the Supreme Court's own analysis as to  
9     whether it will reaffirm or overturn a decision. It is not an  
10    analysis that courts other than the Supreme Court are to engage  
11    in. It is only for the Supreme Court to decide whether it will  
12    step away from earlier precedent, which, again, it has indicated  
13    it is not doing in the abortion context at all.

14            THE COURT: Okay. You may proceed.

15            MS. SCHNELLER: Somewhat along those lines, I wanted just  
16    to note that no ban on abortion before viability has ever survived  
17    a federal court challenge. In addition to the 15-week ban this  
18    Court struck down, bans on abortion at 12 and 20 weeks have been  
19    declared unconstitutional in the last few years, and bans based on  
20    the detection of cardiac activity, bans at six weeks have likewise  
21    been ruled unconstitutional.

22            A federal court struck down North Dakota's similar  
23    six-week ban in 2013. The Eighth Circuit affirmed and the Supreme  
24    Court declined to review that decision in 2016. And last year a  
25    State Court in Iowa struck down that state's similar six-week ban

1 under the State constitution, and the State did not appeal that  
2 decision.

3 And then of the recent spate of similar laws that have  
4 been passed in legislatures this year, none have taken effect. A  
5 federal court entered a temporary restraining order against  
6 Kentucky's similar six-week ban, and the State has agreed not to  
7 enforce that law pending final resolution of that case.

8 Ohio's six-week ban, which like Mississippi's ban takes  
9 effect in July, was challenged last week and a preliminary  
10 injunction motion is pending. And then similar laws passed in  
11 Georgia and Alabama have not yet been challenged, but various  
12 organizations have -- have vowed to challenge those soon. And  
13 there is no reason for this Court to come to a different result  
14 than it did on the 15-week ban or that any of these other courts  
15 have come to.

16 The State also provides no basis on which the Court should  
17 come to a different conclusion. In defense of the six-week ban,  
18 the State recycles essentially three arguments it made just months  
19 ago in defense of the 15-week ban, all of which this Court  
20 rejected.

21 First, the State asks the Court to essentially abandon  
22 decades of precedent on the viability rule, which is nothing more  
23 than a disagreement with the Supreme Court precedent, which has  
24 held that viability is the earliest point at which the State can  
25 constitutionally prohibit abortion. And as we just discussed,

1 this Court is bound to follow those precedents.

2 Second, the State argues that it has interests that can  
3 override a woman's decision whether to obtain an abortion before  
4 viability, and as this Court has recognized when striking down the  
5 15-week ban, while the Court may -- or while the State may have  
6 legitimate interests in regulating abortion, none of those  
7 interests are strong enough to support a ban.

8 And, third, the State argues that the act is actually not  
9 a ban, and it does not prohibit abortion for every woman.  
10 Instead, in the State's view, the act regulates the time during  
11 which a woman can make the decision to seek an abortion before  
12 viability and requires her simply to make that decision earlier.

13 But this is precisely what the constitution forbids, the  
14 State preventing a woman from deciding whether or not to continue  
15 a pregnancy before viability at any point during that previability  
16 period.

17 So in short, this latest attempt to strip women of their  
18 right to abortion before viability is unconstitutional for all the  
19 reasons this Court said the 15-week ban was unconstitutional. But  
20 this act bans abortion as early as six weeks, simply makes it more  
21 extreme, so we, therefore, ask the Court to enter a preliminary  
22 injunction to prevent irreparable harm that would befall  
23 plaintiffs' patients if the right to abortion was essentially  
24 extinguished in this state.

25 THE COURT: In your briefs you indicated that the State

1 has acted -- I think the words are either defied or in defiance of  
2 the Court's earlier order in joining the statute. I was asking  
3 Mr. Minor about the plaintiffs' citation, too. He argued you  
4 cited to the desegregation cases. But I -- is it defiance if --  
5 is it -- I mean, he says it's either different legislature or  
6 different law at least, that they did not move to amend the  
7 existing law, so how might they meet your definition of defiance  
8 or defying the Court's earlier order?

9 And if they have defied the Court's earlier order, what  
10 should this Court do?

11 MS. SCHNELLER: So I -- we're using the word "defiance"  
12 maybe slightly differently. You know, I think that the -- the  
13 legislature has passed a six-week ban in the face of clear Supreme  
14 Court precedent and this Court's ruling just a few months ago  
15 declaring those bans on abortion before viability clearly  
16 unconstitutional. So given the fact the Court was clear and the  
17 Supreme Court has been clear, the legislature acted contrary to  
18 that knowing this law was unconstitutional.

19 THE COURT: I mean, the Court in its earlier order said  
20 that viability begins sometime after 23 or 24 weeks.

21 MS. SCHNELLER: Correct.

22 THE COURT: And we said that the State has no interest in  
23 banning or seeking to obliterate a woman's decision prior to  
24 viability, so anything before 20 weeks, 23 weeks, or anything  
25 before viability, if they had gone off and done a statute that

1 says any abortions after 15 weeks and a day or 16 weeks -- let's  
2 say 16 weeks. Could that be viewed as defiant?

3 MS. SCHNELLER: I think it still would be in defiance of  
4 the Court's ruling that a 15-week ban is a previability ban on  
5 abortion in part because viability occurs at the earliest at 23 to  
6 24 weeks. So given the legislature is clearly aware of this  
7 Court's ruling, they discussed it in the legislative debates on  
8 Senate Bill 2116, and yet still decided to pass a law that they  
9 know is unconstitutional.

10 THE COURT: What stops them from -- if the Court enjoins  
11 this six-week ban, what stops the State, the Governor, from  
12 calling a special session for the purpose of enacting a four-week  
13 ban or a two-week ban? What stops them?

14 MS. SCHNELLER: I don't think anything stops them from  
15 taking that action, but, of course, we would certainly be back in  
16 court here asking the Court to block that law before it took  
17 effect. Because the legislature as a separate branch of  
18 government can, of course, pass laws that are unconstitutional,  
19 even knowingly, and we will be back in court asking those laws to  
20 be blocked.

21 THE COURT: And the executive can enforce laws that are  
22 unconstitutional?

23 MS. SCHNELLER: Well, so that right if the -- I think if  
24 the executive tried to enforce the 15-week ban that this Court  
25 enjoined, then we would be back asking the Court to enforce its

1 injunction against the 15-week ban. That would be clear defiance  
2 of that specific order.

3 THE COURT: That would be clear defiance. Okay. All  
4 right. Thank you, Michelle.

5 MS. SCHNELLER: Thank you, Your Honor.

6 MR. BARNES: May it please the Court?

7 THE COURT: You may proceed.

8 MR. BARNES: Your Honor, no, passing a new law would not  
9 violate the Court's injunction. As Ms. Schneller said, if the  
10 executive branch attempted to enforce the 15-week law in direct  
11 violation of this Court's injunction, this Court could, you know,  
12 bring the State back into court, whatever person was responsible  
13 for trying to enforce it. That is clearly within the scope of the  
14 Court's injunction.

15 A legislature with a different composition passing a  
16 similar, or what the Court believes to be a related law, does not  
17 violate the injunction. And, of course, due process says if that  
18 happens, the Court strikes down the law if it finds it  
19 unconstitutional. But it's not a violation of the injunction.

20 Second, before I get into my planned argument, I wanted to  
21 address the stare decisis argument that the Court raised. The  
22 Court's reversal of *Nevada v. Hall* certainly gives pause to those  
23 who thought that case was firmly entrenched on the basis of it was  
24 40 years old. Stare decisis required the Court to continue that  
25 line of cases, and they said, no, we're not.

1           However, I do agree with Ms. Schneller that that does not  
2           mean that the lower courts are any less bound by Supreme Court  
3           precedent. That it is the Supreme Court that may decide we're no  
4           longer going to give the same stare decisis effect to our earlier  
5           decisions. However, it certainly -- as an analytical matter, it  
6           certainly raised questions in everyone's mind as to exactly how  
7           strong the current composition of the Supreme Court will view  
8           stare decisis.

9           And, yes, that at least conceivably could have some impact  
10          on the future at the Supreme Court level, because as the Court is  
11          well aware, *Casey* reaffirmed the central holding of *Roe* based  
12          largely on the stare decisis. And you've mentioned the entire  
13          section on the -- on the value of precedent, so that certainly is  
14          a point to consider. But it does not change the validity or the  
15          binding effect of the Supreme Court decisions on the lower courts  
16          today. It's just something that everyone needs to think about and  
17          certainly keep in mind.

18          THE COURT: Should the Court, then, think about what the  
19          Supreme Court has done in the last five or six years with a number  
20          of cases *Shelby County versus Holder*, the *Janice* case, *Citizens*  
21          *United*, all those are -- were long-standing precedents that this  
22          court, the Supreme Court, has now determined that they were no  
23          longer to at least be bound to that understanding -- those  
24          understandings of those principals in those cases.

25          MR. BARNES: I think it does to the extent that if there's

1 any room to distinguish a current case, a new case from an  
2 existing Supreme Court case that is considered to be just  
3 absolutely clear and unequivocal that perhaps there is a room --  
4 the Supreme Court is finding room to look and find other reasons.  
5 Perhaps there are reasons for the lower courts to at least  
6 consider whether or not the case is as broad as it was earlier  
7 perceived. I think that's, of course, something the Court needs  
8 to do, in my opinion, with any case.

9 But, again, I think it's primarily just -- maybe it's a  
10 signal. Maybe it's a warning sign, but until the Court says we're  
11 overruling or changing this case, it does not. It does not have  
12 any impact on the Court's ruling on this law today, because it is  
13 our position that this law is constitutional under existing  
14 Supreme Court precedent.

15 THE COURT: How? That gets us to the central focus of *Roe*  
16 and *Casey*, I think. I'm looking at *Casey*, and -- and, you know,  
17 I'm going to adopt the textualism sort of argument and apply it to  
18 a Supreme Court opinion, itself. It opens up with the very first  
19 paragraph or the headnote, it must be stated at the outset and  
20 with clarity that *Roe's* essential holding, the holding we  
21 reaffirm, has three parts.

22 First, it is a recognition of the right of a woman to  
23 choose to have an abortion before viability and to obtain it  
24 without undue interference from the State. Before viability, the  
25 State's interests are not strong enough to support a prohibition

1 of abortion or the imposition of a substantial obstacle to the  
2 woman's effective right to elect the procedure. That's what they  
3 open up with in *Casey*, boom, that's what they say. Previability  
4 State has zero interest, so how does that -- this law not collide  
5 with that fundamental principal?

6 MR. BARNES: I think actually, Your Honor, as I interpret  
7 the case it says the State has legitimate interest in protecting  
8 unborn life, protecting maternal health, and in protecting the  
9 ethics and integrity of the medical provision from the outset,  
10 from conception. However, the State's interests are not strong  
11 enough to support a previability ban, because that is the point at  
12 which the State's interests become compelling.

13 I think it's important to note even though *Casey* expressly  
14 rejected *Roe*'s language, which appeared to make that case -- make  
15 abortion a fundamental right, which would make the law subject to  
16 strict scrutiny, *Casey* said, no, we reject that interpretation of  
17 *Roe*, because it undervalues the State's interest in life.

18 And I think it's important to think about how the Court,  
19 itself, has interpreted *Casey* in later cases. As you know, we  
20 cite *Gonzales*. We cite the majority opinion in *Gonzales*  
21 extensively by Justice Kennedy, and note that that's an extension  
22 of his dissent in *Carhart*, you know, the Nebraska state partial  
23 abortion case. Justice Kennedy dissented, and says the way the  
24 standard is being interpreted by the lower courts, the way the  
25 courts are interpreting the undue burden standard is wrong. It's

1 too strict. It's like they're still applying strict scrutiny.  
2 They didn't notice that we said no, and it still undervalues the  
3 State's interest.

4 In *Gonzales versus Carhart*, of course, Justice Kennedy  
5 wrote the majority. But the most telling statements in *Gonzales*  
6 we think are in Justice Ginsburg's dissent. I mean, certainly  
7 Justice Ginsburg is, you know, a staunch proponent of women's  
8 rights, including the right to abortion and a woman's right to  
9 autonomy. No one is a stronger supporter of those rights on the  
10 court.

11 Justice Ginsburg said *Casey's* principals concerning --  
12 confirming the continuing viability of the essential holding of  
13 *Roe* are merely assumed for the moment, rather than retained to  
14 reaffirm. She goes on to say, today the court blurs the line  
15 maintaining that the act legitimately -- legitimately -- I  
16 apologize, I'm having trouble with my speech this morning, Your  
17 Honor -- legitimately applies both previability and post-viability  
18 because a fetus is a living organism while within the womb whether  
19 or not it is viable outside the womb.

20 Last, Justice Ginsburg said in cases of a woman's liberty  
21 to determine whether to continue her pregnancy, this Court has  
22 identified viability as a critical consideration. We agree. I  
23 think we use the term "central." Justice Ginsburg says "a  
24 critical consideration." Viability is a "critical consideration."

25 THE COURT: Has the Supreme Court ever sustained a

1     previability ban on abortion?

2             MR. BARNES: Your Honor, I think we first have to explore  
3     what the word "ban" really means. As I understand the term "ban,"  
4     that means you can't do it. You can't have it ever. When you  
5     start adding terms like saying, "a near complete ban," then you're  
6     not really talking about a ban. You're talking about something  
7     else.

8             THE COURT: Has the Supreme Court ever sustained an  
9     abortion -- or the State's interest in denying a woman's right to  
10    self-autonomy, an abortion, prior to the time that the fetus is  
11    viable? Before viability, has the court ever done that?

12            MR. BARNES: I'm sorry. Could you repeat the question,  
13    Your Honor?

14            THE COURT: Has the court ever sustained a procedure that  
15    interfered with the woman's right to have that procedure prior to  
16    the fetus being viable or having reached viability?

17            MR. BARNES: Well, certainly the court has authorized  
18    restrictions on abortion previability as long as they do not  
19    constitute a substantial obstacle. I think something that appears  
20    to be lost in this debate a lot is that when we're talking Casey,  
21    if we're talking the undue burden standard, we're talking about  
22    previability restrictions, because post-viability it is clear the  
23    State has a compelling interest in protecting unborn life and may  
24    ban abortion, as long as there's an exception for the health of  
25    the mother.

1 THE COURT: Post-viability.

2 MR. BARNES: Post-viability, yes.

3 But previability, that means if you're applying the undue  
4 burden test, you're trying to decide, and the Supreme Court is  
5 trying to decide, whether or not a particular previability  
6 restriction is, in fact, constitutional. So *Casey* applies  
7 previability, that's the core of the -- of the decision, and  
8 that's the way the Court applied it in *Gonzales versus Carhart*  
9 when the Court struck down the partial birth -- well, excuse me,  
10 upheld the federal law barring partial-birth abortion, which is  
11 why it led Justice Ginsburg to say the Court is blurring the line  
12 because at least in -- actually, we think the Court blurred the  
13 line a lot in *Casey*, itself. But she says the Court is blurring  
14 the line saying it is constitutional both pre and post-viability.  
15 And obviously, that concerned Justice Ginsburg, because she  
16 understood that the majority opinion could be read to say there  
17 are laws that apply on both sides. So --

18 THE COURT: But even since *Gonzales* has the court  
19 sustained a procedure that deprives a woman the right to elect to  
20 have that procedure prior to the fetus being viable?

21 MR. BARNES: I don't think the court has been presented  
22 with a case that includes multiple state interests, including the  
23 right to protect unborn life and the interest to protect the  
24 maternal health and the interest to protect the integrity of the  
25 medical profession. *Hellerstedt* --

1 THE COURT: Let me --

2 MR. BARNES: I'm sorry, Your Honor.

3 THE COURT: Let me ask you this. Has any court, has any  
4 federal court or any court sustained -- this is not the first  
5 fetal heartbeat, for example. This is not the first case that was  
6 15 weeks. In fact, I think the other side has cited cases as much  
7 as 20 weeks, which from this Court's earlier opinion and from the  
8 law that the Court has cited before viability, typically begins at  
9 some point later than 22, 23, 24 weeks, has there been a case  
10 where the Court has sustained a procedure or deprived the woman  
11 the right to elect to have the procedure prior to the fetus being  
12 viable?

13 MR. MINOR: The District Court of Arizona, Your Honor, the  
14 Ninth Circuit reversed. But the District Court there -- I believe  
15 it was a 20-week law. The District Court in Arizona did  
16 originally uphold the law. The Ninth Circuit reversed. I am not  
17 aware of any decisions by courts yet upholding such a law.

18 However, the fact that it has not happened yet doesn't  
19 mean that it will not happen, and as I was -- I apologize for  
20 interrupting the Court earlier. I was just trying to say that  
21 *Hellerstedt*, the Court's most recent statement on abortion, was  
22 based purely on the alleged interest and protection of maternal  
23 health. The State's interest in protecting unborn life was not  
24 part of that case.

25 So since *Gonzales versus Carhart* the Court has never

1 considered a law where those multiple state interests, including  
2 the State's interest in protecting life from the moment of  
3 conception, which has been recognized by the Supreme Court  
4 directly, the Court has not considered such a law. So we do think  
5 that there is room for such a law to survive, especially when it  
6 is based on an objective medical finding. This is -- now, you  
7 know, the Court discusses the 15-week law or mentions the 15-week  
8 law, and it is true that there are some similarities. Certainly  
9 the previability application of those laws is a similarity.

10 However, the fetal heartbeat law is not based on a  
11 specific gestational age. The 15-week law is. Of course, the  
12 15-week law, being based on a specific gestational age, is  
13 actually consistent with what the international community has  
14 determined the consensus is, that gestational age limitations are,  
15 in fact, the norm in countries other than the United States. The  
16 supposedly progressive countries in Europe: Germany, 14 weeks,  
17 France, 14 weeks, Norway, 12 weeks, Portugal, 10 weeks, Italy,  
18 90 days. In the rest of the world, gestational law -- age laws  
19 are considered the norm.

20 Now, we know the Supreme Court here has said viability is  
21 a crucial concern, but it does not mean that there might not be  
22 alternatives to viability at some point. The Court has not  
23 accepted those, has not considered those, and we freely admit  
24 that.

25 However, the six-week law, it's not a gestational age ban.

1 The term "six-week law" or "six-week ban" -- of course, we  
2 disagree with the word "ban." But the six-week law is based on a  
3 objective medical finding. It's not merely based on a gestational  
4 age. It's based on -- and plaintiffs have frequently reminded us  
5 that every woman is different, that every pregnancy is different,  
6 that there has to be individualized medical attention and  
7 consideration. That's true here, too, because this law doesn't  
8 say it's unconstitutional. All abortions are unconstitutional  
9 when a fetal heartbeat can be detected in some instances. It's  
10 when a fetal heartbeat is detected of a specific fetus carried by  
11 a specific woman. At that point, the law takes effect. An  
12 abortion cannot be performed legally.

13 Now, that is a distinction, because again it is based on a  
14 medical milestone. And the detection of a fetal heartbeat is  
15 important in medicine, because the time we're talking about six,  
16 seven, eight, nine weeks, if a fetal heartbeat is not detected  
17 within that time, it is a strong indication a fetus is not viable  
18 or the fetus has already -- or the embryo at that time it would  
19 be, technically, would be the technical term, that the embryo is  
20 not viable or that the embryo has, in fact, died.

21 So this law is based on objective medical finding. It is  
22 different from laws that are based purely on gestational age. It  
23 is different from laws that don't include any milestone or any  
24 criterion for determining whether an abortion should proceed or  
25 could proceed.

1           Yes, Your Honor, we think that the lower courts have  
2   misinterpreted, misapplied *Casey*, just as the lower courts  
3   misinterpreted and misapplied *Roe*, to the extent that, you know,  
4   about 18 years later the Supreme Court said, wait, we've got to  
5   back off. We didn't intend strict scrutiny to be the standard.

6           We think that the courts are applying *Casey* in a way where  
7   it almost is a strict scrutiny standard or it's stronger, could be  
8   stronger, because the plaintiffs tell us that if any one woman  
9   might be denied the right to choose to have an abortion, that law  
10   is a ban. Justice Ginsburg tells us, well, the large fraction  
11   test, yes, we included that language in *Casey*, but because it's  
12   always one over one, the large fraction test doesn't really mean  
13   anything because any law that only has the effect of banning one  
14   woman from having an abortion is unconstitutional. It's totally  
15   at odds with the large fraction language in *Casey* itself.

16          THE COURT: *Casey* also talks in general terms at least or  
17   maybe even specific terms about line drawing, and it says that  
18   viability is the easiest point at which -- it's the more workable  
19   point I think it says in the opinion, viability. Doesn't say  
20   heartbeat, doesn't say anything like that. It says viability.  
21   Viability, itself, has an element of fairness, I think the Court  
22   said in *Casey*. And it goes back and says that a woman's right to  
23   terminate before viability is the most central principal of *Roe*,  
24   so you have to look at viability. Shouldn't that be the starting  
25   point? Even though you might be able to detect a heartbeat

1 earlier than when the fetus or the embryo is viable.

2 MR. BARNES: It's certainly the starting point, Your  
3 Honor. We don't think it's necessarily the ending point, and I  
4 think that the Court also went on to say in Casey, when it was  
5 discussing the fundamental fairness, went on to say something --  
6 and I am paraphrasing. I apologize. I don't have it in front of  
7 me. It says something like if a woman doesn't get an abortion  
8 until after viability, it's almost like she's waived her right.  
9 She basically knows that she has to exercise her right before  
10 viability and if she doesn't --

11 THE COURT: But sometimes women don't know.

12 MR. BARNES: I agree, Your Honor. I mean, I don't have  
13 any firsthand knowledge. I freely admit that I don't know myself.  
14 Obviously, I'm -- I've known pregnant women in my life. I have  
15 children. However, personally, no, I can't say.

16 However, it's my understanding from reading and research  
17 that some women do know. Certainly some women know that they're  
18 pregnant before six weeks, and so, again, another reason this law  
19 is not a ban is that there are women in this state who would not  
20 be affected, who would know they're pregnant before six weeks and  
21 could obtain an abortion. What number is that? I can't say. You  
22 know, I simply do not know.

23 But I think plaintiffs admit, they say most of our  
24 abortions performed after six weeks. Well, that leaves open the  
25 question how many of those women could actually obtain abortions

1 before a fetal heartbeat is detected if this law went into effect?

2 And it's important to note a fetal heartbeat has been  
3 detected for that fetus, because it's not always six weeks.  
4 Again, the six-week term is the most extreme case, and it's a  
5 little misleading because even plaintiffs have to admit sometimes  
6 you can't detect a fetal heartbeat at six weeks. You have to use  
7 a transvaginal ultrasound, you know, specialized equipment to be  
8 able to do that, and it depends on the skill of the operator, the  
9 person who's performing that ultrasound. If you do an abdominal  
10 ultrasound, it could be seven, eight, nine weeks before a fetal  
11 heartbeat is determined. So, you know, just for the record --

12 THE COURT: Is the State -- is the State going to require  
13 what type of ultrasound is done to determine exactly when the  
14 fetal heartbeat is going to -- does the statute indicate what type  
15 of methods that the provider must use to determine when the  
16 heartbeat begins or --

17 MR. BARNES: One second, Your Honor. Could I look at the  
18 law?

19 THE COURT: Yes.

20 MR. BARNES: I think I know the answer, but I still would  
21 rather look at the law.

22 And my answer is I do not think it does. No, Your Honor,  
23 it says if that person is not violation -- I'm sorry, I'll slow  
24 down. A person is not in violation of Paragraph A of this  
25 Subsection 2 if that person has performed an examination for the

1 presence of a fetal heartbeat in the unborn human individual using  
2 standard medical practice and that examination does not reveal a  
3 fetal heartbeat or the person has been informed by a physician who  
4 has performed the examination for a fetal heartbeat that the  
5 examination did not reveal a fetal heartbeat. So, no, it does not  
6 require a specific method. It leaves it to standard medical  
7 practice.

8 But I believe even in Dr. Carr-Ellis' supplemental  
9 affidavit, they did correct some of the problems of the original  
10 declaration, but even the supplemental declaration she says, you  
11 know, typically we don't do a transvaginal ultrasound unless we're  
12 very early in pregnancy. The norm is an abdominal ultrasound,  
13 because they're trying to ensure it's not an ectopic pregnancy,  
14 because that, of course, raises serious issues, dangers, much  
15 higher risk of complications, so they have to know where the  
16 pregnancy is, make sure it's not in the tubes before they begin  
17 performing an abortion.

18 But so, no, the law leaves it up to the medical judgment  
19 of the provider, standard medical practice. And, Your Honor --

20 THE COURT: And what is the impact of that, the fetal  
21 heartbeat law? I mean, what -- what if -- I mean, what does the  
22 fetal heartbeat law -- what's the heart of it? I mean, what's the  
23 purpose of it? I mean, what happens, for example, if one  
24 reaches -- there is a fetal heartbeat.

25 MR. BARNES: Studies show that there's a 95 percent chance

1     that the fetus is viable.

2             THE COURT:   Okay.   But there is a fetal heartbeat.   A  
3     doctor goes off and performs the abortion anyway, then is he  
4     subjected to criminal sanctions?   Is that what's in our law?

5             MR. BARNES:   Under our law it would be a misdemeanor.   It  
6     could be a misdemeanor charge.   It also could be grounds for  
7     professional discipline, suspension of a license or some sort --  
8     you know, there's a variety of forms of discipline that the  
9     medical board can take from, you know, no action, a letter of  
10    reprimand, up to, you know, suspending or taking a person's  
11    license permanently.

12            THE COURT:   What happens --

13            MR. BARNES:   So it is a grounds for discipline.

14            THE COURT:   What happens if the patient, if the mother, if  
15    the woman goes to an unlicensed professional or some other person,  
16    some back-alley person, and gets the abortion procedure done?  
17    What does that law do to address that particular individual who  
18    performs that particular abortion?

19            MR. BARNES:   It doesn't, and it doesn't have to, because  
20    that is prohibited by other laws including the physicians' only  
21    requirement and the licensing laws, some of those laws the  
22    plaintiffs are challenging the cumulative effects, because other  
23    Mississippi laws state that only a physician can perform  
24    abortions.   So if there's a nonphysician performing abortions  
25    anywhere in the state, that's already prohibited.   If a person --

1 so other Mississippi laws already covered that situation. This  
2 law does not specifically speak to that. However, they would  
3 be performing -- such an -- such a procedure would be illegal  
4 regardless of whether it was before or after a fetal heartbeat was  
5 detected.

6 Could I have one moment to look at my notes, Your Honor?

7 THE COURT: Yes, you may.

8 MR. BARNES: Your Honor, I think I've covered all my notes  
9 from opposing counsel's argument. In conclusion, I would just say  
10 that, again, we think this law fits in the cracks. It fits in an  
11 open area that *Gonzales* or *Carhart* did not foreclose. It's an  
12 area the Fifth Circuit has not foreclosed, and as was mentioned  
13 earlier in the argument on the previous motion, we are certainly  
14 well-aware of the Court's ruling on the 15-week law and respect  
15 that, which is why we have, again, with respect -- we -- we  
16 disagree with it, and therefore, we have appealed it.

17 However, we certainly recognize that if the Court's  
18 analysis does not change, that the Court's ruling on this law, you  
19 know, is probably going to be very similar. But, again, we think  
20 that respectfully the Court was wrong in that decision, which is  
21 why we have appealed it, and we note this law is separate and  
22 distinct. It is based on an objective medical milestone, and it  
23 is our position that this law is constitutional.

24 THE COURT: Does the State concede or agree that the State  
25 cannot impose an undue burden on a woman at previability or

1 even -- and maybe even some instances post-viability?

2 MR. BARNES: That is my understanding, especially when the  
3 law is based purely on maternal health. I think the question of  
4 whether or not the same -- the undue burden, substantial obstacle  
5 language, the balancing test that the Court has espoused is  
6 directly relevant to a law based on protection of life. I'm not  
7 sure it's quite the same analysis. I think, again, you have to  
8 give the State's interest in protecting life a little more weight.

9 THE COURT: I mean, part of the undue burden the Court  
10 found in Casey was that the woman had to notify their husband  
11 before they had the procedure, and the Court said that's an undue  
12 burden.

13 MR. BARNES: The Court did, because the Court found there  
14 were a certain number of women that would probably be subjected to  
15 domestic violence if they had to tell their husbands. However, in  
16 Casey the Court upheld parental notification, upheld informed  
17 consent, upheld several other abortion restrictions. So, again,  
18 it's not an all or nothing.

19 THE COURT: Yeah, but this statute is all or nothing.  
20 This statute says once the fetal heartbeat is measured, once it's  
21 detected, and whenever that occurs, I guess, then there -- that  
22 techniques could do it -- right now I believe everybody suggests  
23 or concedes in their papers that it's as early as six weeks, but  
24 next year it may be as early as five weeks. I don't know. I  
25 don't know whether a heartbeat begins --

1           MR. BARNES: In viability maybe 20 weeks next year, just  
2 as viability was 27 to 28 weeks at the time of *Roe*. It was 23 to  
3 24 weeks at the time of *Casey*. It's still approximately in that  
4 range today. Although I think the evidence in this case,  
5 Dr. Carr-Ellis' testimony is that it's 23 weeks, so I think we  
6 should be precise when we have a witness who has said 23 weeks.

7           I agree with Your Honor; viability is certainly an  
8 important consideration here. But this law -- you asked about the  
9 purpose of this law. This law was passed to protect the sanctity  
10 of human life. Life, the most precious resource, and that's not  
11 an improper purpose. It's not an improper purpose for people --  
12 again, we believe this law is constitutional under existing -- the  
13 existing framework.

14           However, if there are those who would like to use this as  
15 an opportunity to ask the Supreme Court to revisit, you know, it's  
16 abortion jurisprudence, that's their right. It's not necessary  
17 based on our argument, but it's not improper to seek a change in  
18 law. So, you know, if there are -- it's claimed that Mississippi  
19 does not favor abortion. That is true; the legislature has said  
20 that the policy of the State is to favor life, and so it is.

21           But it's not improper to seek to change the law, but  
22 again, not necessary here, because this law is constitutional  
23 under existing Supreme Court precedent.

24           THE COURT: I -- I cannot see how a six-week -- a six -- I  
25 cannot see how a six-week limitation on a woman's right to decide

1 what she's going to do with her body, the choices that she can  
2 make based on her -- how that survives in the face of this Court  
3 having already struck a 15-week. It -- and I realize the  
4 legislature can do what it wants, and they can say what they want  
5 to say while doing what they do. But it sure smacks of defiance  
6 to this Court. I mean, it sounds like it. You said you can't do  
7 15 weeks, so by golly we're going to do -- we're going to do six  
8 weeks. We're going to cut that down to less than half.

9 MR. BARNES: Your Honor, as I noted earlier, I do -- we  
10 certainly understand the ramifications of the Court's 15-week  
11 ruling, but, again, we disagree. And we respectfully disagree.  
12 We understand the Court does not agree with us on that point,  
13 which is why we have appealed.

14 But, again, it's not -- it's not a law that says at six  
15 weeks gestational age abortion is banned. It's based on the  
16 detection of a fetal heartbeat. That's not always at six weeks.  
17 That is a distinction between the 15-week law where the sole  
18 criterion is that 15 weeks, 0 days, is the deadline for when women  
19 must seek to have an abortion. But just as the Court said in  
20 Casey, you know, if women know that an earlier time is their  
21 limit, and they do not seek to have an abortion within that limit,  
22 it falls on the woman.

23 Now, just as the Court said in Casey, if the woman waits  
24 until after viability, she's given up that right. She's basically  
25 waived it. The bottom line is we acknowledge and respect the

1 Court's ruling. We've taken steps to have it reviewed, and thank  
2 you for your consideration.

3 THE COURT: All right. Thank you, Mr. Barnes.

4 MS. SCHNELLER: Your Honor, I just wanted to make about  
5 three points. First, just to clarify, the -- as Mr. Barnes noted  
6 the bill requires the clinic to -- prohibits abortion after  
7 detection of embryonic cardiac activity based on standard medical  
8 practice. Standard medical practice to detect cardiac activity  
9 early in pregnancy would be a transvaginal ultrasound, which is  
10 what the clinic would do if this law were to take effect. And  
11 cardiac activity is a sign that pregnancy is developing. It is  
12 not an indication of viability within the meaning of that term as  
13 the Supreme Court has used it, which means a reasonable likelihood  
14 of sustained survival outside the womb, which as we've discussed,  
15 not medically possible until 23 weeks at the earliest.

16 And, again, to clarify on *Gonzales*, I think the Court was  
17 clear about *Gonzales* being about a regulation of abortion, not a  
18 ban. In its decision on the 15-week ban, the regulation in  
19 *Gonzales* prohibited the use of one rarely-used procedure. It did  
20 not prohibit abortion. It did not prohibit women from making the  
21 ultimate decision whether to terminate a pregnancy at a certain  
22 point before viability.

23 And last just because this law does not prohibit abortion  
24 for every woman does not mean it's not a ban. The law prohibits  
25 abortion after embryonic cardiac activity has been detected, which

1 means that a woman at that point is unable to make the decision  
2 about her body as to whether to terminate a pregnancy.

3 The State attempts to distinguish a six-week ban from a  
4 total ban, including the one that was struck down in Louisiana  
5 about 20 years ago, which was a total ban on abortion with at  
6 least an exception for a woman's life.

7 Similarly, here the six-week ban prohibits abortion after  
8 cardiac activity has been detected with some exceptions. The  
9 critical point is that at a certain point a woman is no longer  
10 able to make that decision for herself, which the Supreme Court  
11 has said is clearly unconstitutional.

12 THE COURT: That the State robs her of the right to -- or  
13 substitutes itself to determine what she does with her body.

14 MS. SCHNELLER: Exactly. Before viability it is for the  
15 woman to decide yes or no, whether she's going to continue her  
16 pregnancy, and the State may regulate that right, but it cannot  
17 prohibit her from making those fundamental decisions.

18 THE COURT: Okay. Thank you.

19 MS. SCHNELLER: Thank you, Your Honor.

20 THE COURT: All right. The Court is going to take a brief  
21 recess. I'll be back. I might have some more questions. I'm  
22 going to take a brief recess. I'm not suggesting I'm going to get  
23 you an order right now, but we'll take a brief recess.

24 MS. SUMMERS: All rise.

25 (A brief recess was taken.)

1 MS. SUMMERS: All rise.

2 THE COURT: You may be seated. I did have a couple more  
3 questions for the State because the -- not because of, but the  
4 plaintiffs did mention a case that the Court had -- or referenced  
5 a matter, a case, didn't give it the name that the Court is aware  
6 of --

7 MR. BARNES: Yes, Your Honor.

8 THE COURT: -- where I think they mentioned the case  
9 20 years ago or so from the Fifth Circuit. There's a -- and I  
10 assume that case was the *Sojourner T.* case. There, Mr. Barnes,  
11 the Fifth Circuit -- Louisiana had enacted a statute, I think,  
12 that banned abortions, made it a crime to perform an abortion,  
13 except in cases of medical emergency, rape, or incest, and the  
14 Court there ruled it unconstitutional. The Fifth Circuit  
15 affirmed, based primarily on *Casey*, saying, again, you cannot ban  
16 -- and I think the State is saying that the fetal heartbeat,  
17 itself, is not a ban, but if you discover a fetal heartbeat, you  
18 cannot have an abortion, that's my reading of the statute.

19 MR. BARNES: Just like if a doctor determines that it's  
20 not viable, you can't have an abortion. But I agree with Your  
21 Honor, I believe that *Sojourner*, again, with those limited  
22 exceptions was -- did say abortions could not be performed. I may  
23 be wrong, but I think that was the same year as *Casey*. Was it not  
24 1992 in *Sojourner*?

25 THE COURT: 1992.

1 MR. BARNES: And so *Casey* was fresh off the -- or hot off  
2 the presses when *Sojourner* was decided by the Fifth Circuit.

3 THE COURT: And was denied by the Supreme Court the  
4 following year, though, 1993.

5 MR. BARNES: It was. It was. But again, it was fresh.  
6 *Casey* was fresh; *Casey* hadn't been interpreted. *Gonzales* didn't  
7 exist yet. You know, Justice Ginsburg had not sent up the warning  
8 flags that perhaps the Court was moving in a different direction.  
9 But, yes, *Sojourner* does say that, but *Sojourner* is not based on  
10 the detection of a fetal heartbeat.

11 Our position here today, I'm not talking about any laws  
12 that act before the detection of a fetal heartbeat. I offer no  
13 opinion on those, Your Honor, on the constitutionality or  
14 unconstitutionality of such laws. But when a fetal heartbeat is  
15 detected, it is our position that law is constitutional.

16 THE COURT: Right. And it becomes -- it, therefore, is a  
17 ban. After a fetal heartbeat is detected, you cannot have an  
18 abortion no matter the consequences, the scope, no matter what --  
19 where you are in your life -- this is to the woman, where you are  
20 in your life, no matter what. Once the fetal heartbeat is  
21 detected in Mississippi, she cannot have an abortion under any  
22 circumstances whatsoever.

23 MR. BARNES: There are some --

24 THE COURT: Except for a medical emergency.

25 MR. BARNES: Yes, I was going to say, Your Honor, there is

1 a health exception. Again, we respectfully disagree with the  
2 Court's interpretation of the term "ban," but we recognize that we  
3 are in respectful disagreement.

4 THE COURT: Which leads me to the next question. The only  
5 exception to the heartbeat is if the woman's life becomes -- she  
6 meets a medical emergency as defined in that statute. I think  
7 it's a definition that's given for medical emergency that's set  
8 forth in that statute, I think. It's described at least. So in  
9 this case, under this statute, there is no rape or incest  
10 exception, is there?

11 MR. BARNES: Your Honor, it's my understanding there's not  
12 a rape or incest exception.

13 THE COURT: So a --

14 MR. BARNES: And all I can say on that is I don't believe  
15 the Supreme Court has ever required rape or incest exceptions. It  
16 has required an exception for the health of the mother, and the  
17 Supreme Court has said that exception is required post-viability  
18 as well as previability.

19 THE COURT: So a child who is raped at 10 or 11 years old  
20 who does not reveal to her parents that the rape has occurred,  
21 because she's scared. She knows the rapist. The rapist may be in  
22 her home. She does not open her mouth about it. Nobody discovers  
23 it until it's too late, that is until the fetal heartbeat is  
24 detectable. That child must then bear this -- must bring this  
25 fetus to term under this statute, because that fetus cannot be

1 aborted if the fetal heartbeat can be detected.

2 Have I -- I mean, have I described the statute in a way  
3 that it cannot be fulfilled?

4 MR. BARNES: I agree that there is no rape or incest  
5 exception explicitly in the statutory language. I would say the  
6 situation the Court has described would be capital rape, and at  
7 least that's my understanding. And that performing an abortion on  
8 a child that age, a minor, would require either parental consent  
9 or judicial bypass, which Mississippi law does provide.

10 THE COURT: But the Judge could not allow her to have an  
11 abortion through judicial bypass or otherwise, according to the  
12 way the statute reads, because I -- I couldn't allow a child to  
13 have an abortion if the fetal -- and it wouldn't be me. It would  
14 be the Chancery Court, I think, or it would be some state court  
15 judge in most instances.

16 MR. BARNES: Your Honor, I -- we -- I agree with you what  
17 the statute says, and there's no exception for rape or incest.  
18 However, I hesitate to opine on what a family court judge might or  
19 might not have authority to do. Certainly, it would appear to  
20 violate this law, that hypothetical that you've raised. However,  
21 those courts do have special powers, and I am not prepared to  
22 speak about that today.

23 THE COURT: Not special powers to violate state law,  
24 right?

25 MR. BARNES: No, Your Honor. But special -- I understand

1 that their decisions are based primarily on the best interest of  
2 the child. And, again, no, this law is explicit, but I am not  
3 going to opine on whether or not a family law court would have no  
4 other recourse. I simply don't know, and I'm not prepared to  
5 argue that point.

6 THE COURT: But a child, you're saying, might have  
7 recourse there through the family court. But an adult would not.

8 MR. BARNES: No, Your Honor.

9 THE COURT: Because an adult who is raped doesn't have to  
10 get parental notification. And if she does not become aware that  
11 she is pregnant because of the rape until after the fetal  
12 heartbeat is detected, she would have absolutely no recourse then,  
13 correct?

14 MR. BARNES: Your Honor, to clarify, I'm saying that I do  
15 not know whether there might be any recourse for a child. I'm not  
16 saying there is or is not. I simply do not know.

17 As for an adult, again, the law -- the statutory language  
18 is clear after the detection of a fetal heartbeat, then only the  
19 medical exception contained in the statute would permit a legal  
20 abortion.

21 THE COURT: Obviously, the legislature was fully aware  
22 that it did not create a rape exception, incest exception, or any  
23 kind of exception other than the fetal heartbeat.

24 MR. BARNES: Your Honor, I cannot speak to what the  
25 legislature did or did not know. The legislature is not just, you

1 know, one body and there are many legislators. So, no, Your  
2 Honor, I can't say one way or the other.

3 THE COURT: Well, they speak through their statute, and  
4 they did not do it there in the statute.

5 MR. BARNES: They do speak through their statutes, Your  
6 Honor.

7 THE COURT: All right. Thank you, Mr. Barnes.

8 Any follow-up based on the question I've asked the State  
9 with respect to that?

10 MS. SCHNELLER: No, Your Honor.

11 THE COURT: All right. Thank you all for -- Mr. McDuff, I  
12 didn't ask if you were still on the phone. I assume you are.

13 MR. MCDUFF: I am on the phone, Your Honor. Thank you.

14 THE COURT: Thank you all for making yourselves available  
15 for this argument. The Court believes it's important these types  
16 of cases that affect us all to make sure there's a public airing  
17 of the case. I think the public has a right to know. The public,  
18 obviously, is interested.

19 And the Court is going to take the arguments into  
20 consideration with the briefing that's already been done, and the  
21 Court will seek to make a ruling as soon as possible so that the  
22 parties can figure out what might be their next steps. I realize  
23 that the statute, if the Court does not enjoin the statute, it  
24 becomes the law of the state on July 1st. The Court is fully  
25 aware of that, and the Court intends to have a ruling so that

1 persons will know how to proceed after July 1 or be ready to  
2 proceed in a way July 1 going forward.

3 Is there anything else from the plaintiff?

4 MS. SCHNELLER: No, Your Honor.

5 THE COURT: Is there anything else from the State?

6 MR. BARNES: No, Your Honor.

7 THE COURT: All right. Thank you, Counsel. I appreciate  
8 you. Court is adjourned.

9 MS. SUMMERS: All rise.

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**COURT REPORTER'S CERTIFICATE**

I, Candice S. Crane, Certified Court Reporter, in and for the State of Mississippi, Official Court Reporter for the United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true, and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I further certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

THIS the 23rd day of May, 2019.

/s/ Candice S. Crane, CCR

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